UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JTH TAX, INC. d/b/a LIBERTY TAX SERVICE,

Plaintiff,

Civil No. 2:07cv170

v.

KENYA WHITAKER AND
EASY SOFTWARE SOLUTIONS, LLC.,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNT III (NEGLIGENT MISREPRESENTATION) AND COUNT IV (BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING) OF DEFENDANTS' COUNTERCLAIM

Now comes the Plaintiff and Counterclaim-Defendant, JTH Tax, Inc. d/b/a Liberty Tax Service ("Liberty"), by counsel, and for its Memorandum in Support of its Motion to Dismiss Counts III & IV of Defendants' Counterclaim, states as follows:

FACTS

The Defendants and Counterclaim-Plaintiffs Kenya Whitaker and Easy Software Solutions, LLC (collectively "Whitaker") filed a Counterclaim against Liberty alleging, among other things, Negligent Misrepresentation and Breach of an Implied Covenant of Good Faith and Fair Dealing. *See*, *Counterclaim*, p. 6-7. The Counterclaim alleges that certain representations by Liberty regarding services and products were false, and that Liberty knew the Defendants would reply upon them. Moreover, the Counterclaim alleges an independent tort claim based upon an alleged breach of duty of good faith and fair dealing.

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DISCUSSION

I. Virginia does not Recognize the Tort of Negligent Misrepresentation.

Negligent Misrepresentation is not a tort recognized by the Virginia Supreme Court. *Haigh v. Matsushita Electric Corp.*, 676 F. Supp. 1332, 1350 (D. Va. 1987) ("Haigh concedes that the Virginia Supreme Court has not recognized the tort of negligent misrepresentation, yet argues that this Court should do so…. The Court … decline[s] the invitation…."); *Hirschler, et al. v. GMD Investments, et al.*, 1992 U.S. App. LEXIS 18492 (4th Cir. 1992) (Virginia law does not recognize the tort of negligent misrepresentation); *A.T. Massey Coal Co. v. Rudimex Gmbh*, 2006 U.S. Dist. LEXIS 1882 (E.D. Va. 2006)(Virginia law does not recognize any tort of negligent misrepresentation).

II. Virginia does not Recognize an Independent Tort Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.

The Virginia Supreme has likewise refused to recognize an independent cause of action for Breach of an Implied Covenant of Good Faith and Fair Dealing. *See Derthick v. Bassett-Walker, Inc.*, 904 F. Supp. 510, 522 (W.D. Va. 1995), *aff'd*, 106 F.3d 390 (4th Cir. 1997), *cert. denied*, 522 U.S. 819 (1997) ("Robbins also argues that Bassett-Walker violated a covenant of good faith and fair dealing, but Virginia does not recognize an independent claim for breach of this implied covenant.");

Hence, neither Count III nor Count IV of Defendants' Counterclaim, for Negligent Misrepresentation and Breach of Duty of Implied Covenant of Good Faith, are valid bases upon which to rest claims in Virginia.

WHEREFORE, in consideration of the foregoing, Liberty respectfully requests that this Court dismiss Counts III & IV of Defendants' Counterclaims for Negligent Misrepresentation and Breach of Implied Covenant of Good Faith and Fair Dealing.

Respectfully submitted,

JTH Tax, Inc. d/b/a Liberty Tax Service

By: ________________/s/______________________
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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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